No. 10-18

In the Supreme Court of the United States

WEBSTER M. SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

LANNY A. BREUER
Assistant Attorney General

SCOTT A.C. MEISLER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the United States Court of Appeals for the Armed Forces applied the correct standard of review to petitioner's claim that the military judge's limitation on the cross-examination of a government witness violated the Confrontation Clause of the Sixth Amendment.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 10
Conclusion 20

TABLE OF AUTHORITIES

Cases:

Alford v. *United States*, 282 U.S. 687 (1931) 13
Davis v. *Alaska*, 415 U.S. 308 (1974) 14
Delaware v. *Van Arsdall*, 475 U.S. 673 (1986) 7, 10, 11, 12, 13
District of Columbia v. *Clawans*, 300 U.S. 617 (1937) 13
Gall v. *United States*, 552 U.S. 38 (2007) 12, 14
General Elec. Co. v. *Joiner*, 522 U.S. 136 (1997) 12
Glasser v. *United States*, 315 U.S. 60 (1942) 13
Miller v. *Fenton*, 474 U.S. 104 (1985) 12, 13
Monsanto Co. v. *Geertson Seed Farms*, 130 S. Ct. 2743 (2010) 12
Old Chief v. *United States*, 519 U.S. 172 (1997) 13
Olden v. *Kentucky*, 488 U.S. 227 (1988) 19
Snyder v. *Louisiana*, 552 U.S. 472 (2008) 13
Sprint/United Mgmt. Co. v. *Mendelsohn*, 552 U.S. 379 (2008) 13
United States v. *Abel*, 469 U.S. 45 (1984) 13
United States v. *Atwell*, 766 F.2d 416 (10th Cir.), cert. denied, 474 U.S. 921 (1985) 17, 18
United States v. *Banker*, 60 M.J. 216 (C.A.A.F. 2004) 9

Cases—Continued: Page

United States v. *Carruthers*, 64 M.J. 340 (C.A.A.F. 2007) 17
United States v. *Cole*, 31 M.J. 270 (C.M.A. 1990) 7
United States v. *Davis*, 393 F.3d 540 (5th Cir. 2004) 16
United States v. *Hitt*, 473 F.3d 146 (5th Cir. 2006), cert. denied, 549 U.S. 1360 (2007) 14, 15
United States v. *Israel*, 60 M.J. 485 (C.A.A.F. 2005) ... 8, 17
United States v. *Kenyon*, 481 F.3d 1054 (8th Cir. 2007) ... 16
United States v. *Larson*, 495 F.3d 1094 (9th Cir. 2007), cert. denied, 552 U.S. 1260 (2008) 10, 16, 17, 18
United States v. *Linzy*, 604 F.3d 319 (7th Cir. 2010), cert. denied, No. 10-5391, 2010 WL 2786838 (Oct. 4, 2010) 14, 15, 16
United States v. *Martínez-Vives*, 475 F.3d 48 (1st Cir. 2007) 14, 15
United States v. *Montelongo*, 420 F.3d 1169 (10th Cir. 2005) 17
United States v. *Mullins*, 613 F.3d 1273 (10th Cir. 2010) 14
United States v. *Oaks*, 606 F.3d 530 (8th Cir. 2010) 14
United States v. *Robinson*, 583 F.3d 1265 (10th Cir. 2009) 17
United States v. *Rosario Fuentez*, 231 F.3d 700 (10th Cir. 2000) 18
White v. *Coplan*, 399 F.3d 18 (1st Cir.), cert. denied 546 U.S. 972 (2005) 19
Wisniewski v. *United States*, 353 U.S. 901 (1957) 17, 18

Constitution, statutes and rules: Page

U.S. Const. Amend. VI (Confrontation Clause) ..... *passim*
Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*:
Art. 31(b), 10 U.S.C. 831(b) 5
Art. 66(c), 10 U.S.C. 866(c) 7, 19
Art. 67(a), 10 U.S.C. 867(a) 20
Art. 80, 10 U.S.C. 880 2
Art. 86, 10 U.S.C. 886 ..... 2, 4
Art. 92, 10 U.S.C. 892 ..... 2, 4
Art. 120, 10 U.S.C. 920 4
Art. 125, 10 U.S.C. 925 ..... 2, 4
Art. 127, 10 U.S.C. 927 ..... 2, 4
Art. 128, 10 U.S.C. 928 4
Art. 134, 10 U.S.C. 934 ..... 2, 4
Military R. Evid.:
Rule 412 4
Rule 412(a)(1) 4
Rule 412(b)(1)(C) 5
Rule 412(c)(3) 5

In the Supreme Court of the United States

No. 10-18

WEBSTER M. SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-21a) is reported at 68 M.J. 445. The opinion of the United States Coast Guard Court of Criminal Appeals (Pet. App. 23a-58a) is reported at 66 M.J. 556. The order of the military judge (Pet. App. 59a-64a) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on March 29, 2010. The petition for a writ of certiorari was filed on June 28, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following a general court-martial, petitioner was convicted of one specification of sodomy, in violation of Article 125 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 925; one specification of extortion, in violation of Article 127 of the UCMJ, 10 U.S.C. 927; one specification of indecent assault, in violation of Article 134 of the UCMJ, 10 U.S.C. 934; one specification of attempting to disobey a lawful order, in violation of Articles 80 and 92 of the UCMJ, 10 U.S.C. 880, 892; and one specification of absence without leave, in violation of Article 86 of the UCMJ, 10 U.S.C. 886. Pet. App. 23a-24a. The members sentenced petitioner to dismissal from the Coast Guard, six months' confinement, and forfeiture of all pay and allowances. *Id.* at 24a. The convening authority approved the sentence as adjudged. *Ibid.* The United States Coast Guard Court of Criminal Appeals affirmed. *Id.* at 23a-58a. On discretionary review, the United States Court of Appeals for the Armed Forces (CAAF) also affirmed. *Id.* at 1a-21a.

1. Petitioner is a former Coast Guard Academy cadet. Pet. App. 3a. In 2005, he and a female classmate, referred to in the petition appendix as "SR," were assigned to neighboring vessels in Norfolk, Virginia as part of the Academy's cadet summer training program. *Ibid.* While there, SR engaged in activity that violated Coast Guard regulations and the UCMJ, and thereby potentially jeopardized her career. *Ibid.*; *id.* at 60a, 62a. Petitioner heard rumors about the incident and contacted SR. *Id.* at 3a. SR discussed the situation with petitioner but, as she later admitted, lied about some of the details to make herself look better. *Id.* at 3a, 26a. Petitioner assured SR that he would "try to squash [the] rumors." *Id.* at 3a.

After they had returned to the Academy in the fall, petitioner contacted SR again and told her he was still hearing the rumors. Pet. App. 3a, 26a, 60a. At this point, SR told petitioner the whole truth about the incident, out of fear that he would otherwise stop helping her. *Id.* at 26a. Petitioner said that he would need "motivation" to continue helping SR to suppress the rumors. *Id.* at 3a, 26a; C.A. App. 200. Although denying that he was demanding sexual favors, petitioner proposed that he and SR take a nude photograph together as a sign of trust. Pet. App. 3a-4a. SR permitted petitioner to take the photograph in her room that evening. *Id.* at 4a, 26a.

Petitioner returned to SR's room later that night. Pet. App. 4a. He laid down in her bed, fondled her breast, and inserted his fingers into her vagina. C.A. App. 133-136, 201; Pet. App. 4a. Petitioner then performed oral sex on SR, after which SR performed oral sex on petitioner. C.A. App. 135-138; Pet. App. 4a, 60a.

Petitioner claimed that this sexual activity was consensual—an assertion that, if true, would have meant that both he and SR violated Coast Guard regulations against consensual sexual activity in Academy barracks. See Pet. 4; C.A. App. 188-189 (regulations). SR, however, explained that she had verbally objected to petitioner's actions. *Id.* at 134-135. She further explained that she went along only because she was "scared to upset him because he had a big secret of mine." Pet. App. 26a; C.A. App. 137.

2. a. Following an investigation into this and other alleged misconduct involving petitioner, the prosecuting authority determined that ten specifications against petitioner should be tried by general court-martial. C.A. App. 89-98. Three of the specifications concerned petitioner's activities with SR: one specification of sodomy,

in violation of Article 125 of the UCMJ, 10 U.S.C. 925; one specification of extortion, in violation of Article 127 of the UCMJ, 10 U.S.C. 927; and one specification of indecent assault, in violation of Article 134 of the UCMJ, 10 U.S.C. 934. C.A. App. 95. Petitioner was also charged with an additional specification of sodomy; an additional specification of extortion; one specification of absence without leave, in violation of Article 86 of the UCMJ, 10 U.S.C. 886; one specification of disobeying a lawful order, in violation of Article 92 of the UCMJ, 10 U.S.C. 892; one specification of rape, in violation of Article 120 of the UCMJ, 10 U.S.C. 920; one specification of assault, in violation of Article 128 of the UCMJ, 10 U.S.C. 928; and one specification of unlawful entry, in violation of Article 134 of the UCMJ, 10 U.S.C. 934. C.A. App. 91, 92, 95.

b. Before the court-martial, petitioner filed a motion seeking to introduce evidence of SR's sexual history. Pet. App. 59a. According to petitioner, the incident that SR had been trying to keep secret was a sexual encounter with an enlisted man. *Id.* at 27a. Petitioner claimed that SR had originally told petitioner that the encounter involved only oral sex and was not consensual, but had admitted in the fall that the encounter included intercourse and was consensual. *Ibid.*

Petitioner did not dispute that this evidence was presumptively barred by Military Rule of Evidence (M.R.E.) 412, which generally prohibits the introduction in a sexual-misconduct case of evidence "offered to prove that any alleged victim engaged in other sexual behavior." M.R.E. 412(a)(1); see Pet. App. 61a; C.A. App. 179-181. Petitioner argued, however, that the evidence was admissible under the Rule's exception for "evidence the exclusion of which would violate the constitutional rights of

the accused." M.R.E. 412(b)(1)(C); see Pet. App. 61a; C.A. App. 180-181.

As required by the Rule, see M.R.E. 412(c)(3), the military judge held a closed evidentiary hearing on petitioner's motion. Pet. App. 60a. Petitioner testified about his claims regarding the nature of SR's secret. *Id.* at 59a; C.A. App. 107-108. After being informed of her rights against compulsory self-incrimination, SR declined to testify at the hearing. *Id.* at 100, 177-178; see UCMJ Art. 31(b), 10 U.S.C. 831(b).

c. The military judge denied petitioner's motion in a written order, rejecting "several theories" offered by petitioner for admitting evidence of SR's sexual history. Pet. App. 59a-64a. The military judge determined that the evidence was not admissible for the purpose of impeaching SR's credibility generally, reasoning that SR's unwillingness to admit unlawful activity to petitioner was not very probative of her character for truthfulness; that members (the military equivalent of jurors) might well consider the evidence improperly "for its tendency to prove that [SR] is a bad person"; and that "conflicting testimony on this point * * * could easily sidetrack members" from focusing on the charged offenses. *Id.* at 62a. The military judge further determined that the sexual-history evidence was not admissible in order for the members to assess how far SR might go to protect her secret, because the members "could be informed that the secret was information that if revealed could have an adverse impact on her Coast Guard career, including possibly disciplinary action under the UCMJ." *Ibid.*

Finally, the military judge determined that the evidence was not admissible to show that SR "has a propensity to bring false accusations against men with whom she has had consensual sexual encounters," because its

"minimal probative value" was "outweighed by danger of unfair prejudice to [SR]'s privacy interests and the potential danger of sidetracking the member[s'] attention to a collateral issue." Pet. App. 63a, 64a. The military judge noted that the evidence was "not strong since it comes from the accused, who has an obvious bias." *Id.* at 63a. "More important," the military judge continued, the alleged prior sexual misconduct did not involve "an official complaint." *Ibid.* "[E]ven if [SR] falsely told [petitioner] *in confidence* that her sexual encounter with the enlisted man was non-consensual *in an effort to suppress rumors*," the military judge reasoned, "this would have little value in proving that her *official* allegations against [petitioner] *resulting in a public trial* are also false." *Id.* at 64a.

d. During the court-martial, SR testified on direct examination that she had been involved in a "bad situation" during the summer of 2005 that she believed could threaten her career and jeopardize her ranking. C.A. App. 124. She further testified that she did not reveal the "whole situation" to petitioner at first. *Id.* at 125.

On cross-examination, defense counsel elicited from SR that, to convince petitioner to help her, she had initially "lie[d] to" him by omitting details about her prior conduct that painted her in "a bad light." C.A. App. 148-149. In accordance with the pre-trial ruling, the military judge did not permit the defense to cross-examine SR about the specific details of her secret.

e. The members found petitioner guilty on all three specifications—sodomy, extortion, and indecent assault—relating to his conduct with SR. C.A. App. 173-174. They also found petitioner guilty of leaving his place of duty and attempting to disobey an order. *Ibid.* They acquitted him of the remaining charges. *Ibid.* Petitioner

was sentenced to six months of confinement, dismissal from the Coast Guard, and forfeiture of all pay and allowances. *Id.* at 175.

3. The United States Coast Guard Court of Criminal Appeals affirmed. Pet. App. 23a-58a. As relevant here, petitioner argued on appeal that the military judge had violated his rights under the Confrontation Clause of the Sixth Amendment "by limiting his cross-examination of SR." *Id.* at 24a. The court majority reviewed that claim de novo, pursuant to its statutory obligation to affirm "only such findings of guilty * * * as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." UCMJ Art. 66(c), 10 U.S.C. 866(c); see Pet. App. 25a & n.7; see also *United States* v. *Cole*, 31 M.J. 270, 272 (C.M.A. 1990) (Article 66(c) confers "*de novo* power of review").

Applying that de novo standard, the majority found "no error in the military judge's ruling" limiting the scope of cross-examination. Pet. App. 33a. It recognized that "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.* at 28a (quoting *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986)). Petitioner, it determined, had the opportunity "to attack SR's credibility by means of showing a prior lie"; "to show" by means other than sexual-history evidence "that SR had a motive to lie in her testimony against" petitioner; and to "portray[] [SR] as the architect of a scheme of false allegations intended to cover up her own misconduct." *Id.* at 31a-32a (internal quotation marks omitted).

That SR's previous lie was allegedly about her sexual history "was no more than superficially relevant, was not

material, and was not vital to [petitioner's] defense." Pet. App. 33a; see *id.* at 28a (confrontation right violated only if excluded evidence is "relevant," "material," and "vital" to defense). In particular, the court rejected any "parallel" between SR's motivation to lie to petitioner about sexual activity with an enlisted man and her motivation to lie to the authorities, and under oath, about her sexual activity with petitioner. *Id.* at 31a. In the former situation, where there were rumors of misconduct, "it is fair to argue" that "avoiding discipline" motivated SR to lie. *Id.* at 30a. In the latter situation, "[t]here is no evidence on the record, no suggestion, and no reason to believe that anyone knew about" her sexual activity with petitioner, "and thus no reason to believe a preemptive false report on her part would be useful to her." *Id.* at 31a.

Judge Tucher dissented in relevant part. Pet. App. 40a-58a. He would have held "that the military judge abused his discretion when he prohibited the defense from cross-examining SR on her false statement to [petitioner] that the encounter [with the enlisted man] was nonconsensual," and that such error was non-harmless. *Id.* at 40a, 58a. He viewed the excluded inquiry to have been "highly probative of the defense theory that SR engaged in a pattern of fabrication to avoid discipline." *Id.* at 40a.

4. The CAAF granted discretionary review on the Confrontation Clause issue and affirmed by a divided vote. Pet. App. 1a-21a. The two-judge plurality stated at the outset that the CAAF "[t]ypically" reviews evidentiary decisions for abuse of discretion, and that it "ha[s] also applied the abuse of discretion standard to alleged violations of the Sixth Amendment Confrontation Clause." *Id.* at 5a (citing, *inter alia*, *United States* v.

Israel, 60 M.J. 485, 488 (C.A.A.F. 2005)). The plurality then concluded that the additional cross-examination of SR barred by the military judge "was not 'constitutionally required.'" *Id.* at 6a. It explained that by allowing petitioner "to present a fairly precise and plausible theory of bias"—namely, that SR "lied to preserve a secret which if revealed could have an adverse impact on her Coast Guard career"—the military judge had "provided [petitioner] what he was due under the Confrontation Clause: an opportunity to impeach the complainant's credibility." *Id.* at 7a (internal quotation marks omitted). The plurality determined that, with the "vital" issue of SR's prior lie already in evidence, "it is unclear why the lurid nuances of her sexual past would have added much to [petitioner's] extant theory of fabrication." *Ibid.*

Judge Baker concurred in the result. In his view, the case was "governed" by the CAAF's decision in *United States* v. *Banker*, 60 M.J. 216, 225 (2004), which placed on petitioner "[t]he burden * * * to prove why the M.R.E. 412 prohibition should be lifted." Pet. App. 8a. Judge Baker concluded that petitioner's "theory of admission [wa]s too far-fetched to pass constitutional * * * muster" because, among other things, "[i]t does not logically follow that someone who would lie to protect her privacy from a probing acquaintance would lie to the police and commit perjury." *Id.* at 9a.

Judge Erdmann, joined by Chief Judge Effron, dissented in relevant part. Pet. App. 10a-21a. Reviewing for abuse of discretion, *id.* at 13a, the dissenting judges concluded that "the evidence [was] clearly admissible," *id.* at 14a, and that the error was non-harmless, *id.* at 21a. In their view, the defense should have been permitted to argue that SR had previously lied about the consensual nature of her sexual activity with an enlisted man

in order to avoid discipline, thereby increasing the likelihood that she was lying about the consensual nature of her sexual activity with petitioner for similar reasons. See, *e.g.*, *ibid.*

ARGUMENT

Petitioner contends (Pet. 12-26) that the CAAF erred in reviewing for abuse of discretion his claim that the military judge's limitations on the cross-examination of SR violated the Confrontation Clause of the Sixth Amendment. That contention lacks merit. The CAAF's standard of review was correct and consistent with this Court's precedents, in particular *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986). There is furthermore no conflict among the circuits that warrants further review of petitioner's case. This Court has recently denied certiorari on the question presented, *Larson* v. *United States*, 552 U.S. 1260 (2008), and should do so again here.

1. a. In *Van Arsdall*, this Court held that a trial court's restrictions on a defendant's cross-examination of a prosecution witness for bias amounted to a violation of the Confrontation Clause, but that the violation was subject to constitutional harmless-error analysis. 475 U.S. at 679-680. In reaching that conclusion, the Court observed that the Confrontation Clause does not "[p]revent[] a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness." *Id.* at 679. Rather, the Court explained, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Ibid.* The Court found a violation of the Confrontation Clause in *Van Arsdall* itself

only because "the trial court [had] prohibited *all* inquiry into the possibility that [the prosecution witness] would be biased as a result of the State's dismissal of his pending public drunkenness charge." *Ibid.*

The military judge's restriction here on the cross-examination of SR is exactly the type of "limit[] on defense counsel's inquiry into the potential bias of a prosecution witness" that the Confrontation Clause gives a trial court "wide latitude" to impose. *Van Arsdall*, 475 U.S. at 679. The military judge did not "prohibit[] *all* inquiry into" a potential source of bias, *ibid.*, but instead "allowed [petitioner] to present a fairly precise and plausible theory of bias"—namely, that SR had previously lied to protect herself and was doing so again, Pet. App. 7a. The members heard SR "admit[] that she had been in a 'situation' that could have jeopardized her career and her ranking as a cadet; that the 'situation' was in violation of cadet regulations and possibly a violation of the UCMJ; and that she initially lied to [petitioner] about the 'situation.'" *Ibid.* Petitioner was limited only from cross-examining SR about the alleged sexual nature of that situation. That limitation was based on the very sorts of "concerns"—"harassment, prejudice, confusion of the issues, * * * [and] marginal[] relevan[ce]"—that the Confrontation Clause permits trial courts to take into account. *Van Arsdall*, 475 U.S. at 679; see Pet. App. 62a-64a (expressing concern that the members would take sexual-history evidence as proof that SR "is a bad person," that such evidence could create "prejudice to [SR]'s privacy interests," that such evidence could "sidetrack[] the member[s'] attention to a collateral issue," and that the "probative value of this evidence is * * * low").

In light of the military judge's "wide latitude" to cabin cross-examination in this way, *Van Arsdall*, 475 U.S. at

679, abuse of discretion was necessarily the appropriate standard of review. Petitioner objects that *Van Arsdall* merely "addresses the substance of the Confrontation Clause," and "reveals nothing about the proper appellate standard of review." Pet. 23. But the proper appellate standard of review naturally depends upon the issue the appellate court is considering. Under *Van Arsdall*, as applied to this case, the issue the appellate court is considering is whether the military judge's limitation on cross-examination was within the "wide latitude" he enjoys under the Confrontation Clause. 475 U.S. at 679. Such consideration is inherently deferential—the question is not what the appellate court itself would have done, but instead whether what the trial court did was "reasonable," *ibid.*—and is therefore properly described as "abuse-of-discretion," rather than "de novo," review. See, *e.g.*, *Gall* v. *United States*, 552 U.S. 38, 56 (2007) (observing that review of whether a sentence is "reasonable" equates to review of "whether the District Judge abused his discretion" in weighing the relevant factors); see also *Monsanto Co.* v. *Geertson Seed Farms*, 130 S. Ct. 2743, 2766 (2010) ("Deference * * * is the hallmark of abuse-of-discretion review.") (quoting *General Elec. Co.* v. *Joiner*, 522 U.S. 136, 143 (1997)).

b. Petitioner suggests (Pet. 16-22) that deferential review of Confrontation Clause claims is anomalous and inappropriate. That suggestion is misplaced. The standard of review applied to a determination of constitutional dimension depends upon the nature of that determination. See *Miller* v. *Fenton*, 474 U.S. 104, 113 (1985) ("[A]n issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question."). Not every constitutional right, or even every constitutional trial right, is reviewed de novo.

A defendant's constitutional right to be free of racial bias in jury selection, for example, is reviewed for clear error. See, *e.g.*, *Snyder* v. *Louisiana*, 552 U.S. 472, 478 (2008). That is because the critical issue is the prosecutor's discriminatory intent, and the trial court is uniquely situated to observe not only the prosecutor's demeanor in explaining his reasons for striking certain jurors but also the demeanor of the potential jurors themselves. *Id.* at 477.

Confrontation Clause claims similarly involve the sorts of judgment calls that the trial judge is in the best position to make. Cf. *Miller*, 474 U.S. at 113-114 (selection of standard of review "at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question"). "In deference to a [trial] court's familiarity with the details of the case and its greater experience in evidentiary matters, courts of appeals afford broad discretion to a [trial] court's evidentiary rulings." *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 384 (2008); see, *e.g.*, *Old Chief* v. *United States*, 519 U.S. 172, 180, 183 n.7 (1997); *United States* v. *Abel*, 469 U.S. 45, 54 (1984). In particular, and as petitioner acknowledges (Pet. 24-26), this Court has repeatedly held that "[t]he extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court," *Alford* v. *United States*, 282 U.S. 687, 694 (1931), and has reviewed restrictions on cross-examination for abuse of that discretion. *Ibid.*; see *Glasser* v. *United States*, 315 U.S. 60, 83 (1942); *District of Columbia* v. *Clawans*, 300 U.S. 617, 632 (1937). As *Van Arsdall* demonstrates, a trial court retains "wide latitude" to exercise its discretion even under the Confrontation Clause, 475 U.S. at 679, and there is

accordingly no basis for allowing an appellant automatically to ratchet up the standard of review simply by invoking the Constitution. See *Davis* v. *Alaska*, 415 U.S. 308, 318 n.6 (1974) (noting that, in *Alford*, the Court had reviewed a cross-examination claim of "constitutional dimension" for abuse of discretion).

2. Petitioner asserts (Pet. 12-16) that certiorari is warranted because five federal circuits—the First, Fifth, Seventh, Eighth, and Tenth—would all have reviewed his claim de novo. That assertion lacks merit. No disagreement exists among the circuits that would justify granting the petition.

a. As a threshold matter, the difference between "de novo" and "abuse of discretion" review for a claim like petitioner's is largely, if not entirely, a matter of terminology. All five of the aforementioned circuits recognize *Van Arsdall*'s conclusion that the Confrontation Clause permits a trial judge to place "reasonable" limits on cross-examination. *United States* v. *Martínez-Vives*, 475 F.3d 48, 53 (1st Cir. 2007); *United States* v. *Hitt*, 473 F.3d 146, 155-156 (5th Cir. 2006), cert. denied, 549 U.S. 1360 (2007); *United States* v. *Linzy*, 604 F.3d 319, 323 (7th Cir. 2010), cert. denied, No. 10-5391, 2010 WL 2786838 (Oct. 4, 2010); *United States* v. *Oaks*, 606 F.3d 530, 539-540 (8th Cir. 2010); *United States* v. *Mullins*, 613 F.3d 1273, 1283 (10th Cir. 2010). As discussed above, de novo review for "reasonableness" is the functional equivalent of abuse-of-discretion review. See *supra* at 12; *Gall*, 552 U.S. at 56.

b. Even if there were a difference between de novo and abuse-of-discretion review in this context, four of the five circuits petitioner cites—the First, Fifth, Seventh, and Eighth—expressly hold that a trial court's limitation on the cross-examination of government witnesses does

not always receive de novo review. Instead, these circuits employ a hybrid approach that varies the standard of review depending upon the precise nature of the defendant's challenge: they review de novo arguments that limitations on cross-examination violated the Confrontation Clause by effectively preventing the defendant from challenging the witness, but review lesser limitations for abuse of discretion. See *Martínez-Vives*, 475 F.3d at 53 ("On a challenge to a district court's limitation of cross-examination, we first perform a *de novo* review to determine whether a defendant was afforded a reasonable opportunity to impeach adverse witnesses consistent with the Confrontation Clause. Provided that threshold is reached, we then review the particular limitations only for abuse of discretion.") (internal quotation marks and citations omitted); *Hitt*, 473 F.3d at 155-156 ("A district court's limitation of cross-examination of a witness is reviewed for abuse of discretion. Abuse-of-discretion review is only invoked if the limitation did not curtail the defendant's Sixth Amendment right to confront witnesses. Whether a defendant's Sixth Amendment rights were violated is reviewed de novo.") (citations omitted); *Linzy*, 604 F.3d at 323 ("When deciding whether limits on cross-examination are permissible, we must first distinguish between the core values of the Confrontation Clause and more peripheral concerns which remain within the trial court's ambit. * * * In determining whether the district court abused its discretion by limiting cross-examination, we must examine whether the jury had sufficient details about the witness to assess the witness' motives and biases. On the other hand, where the limit imposed on cross-examination implicates the core values of the Confrontation Clause, we review the limitation *de novo*.") (internal quotation marks, alter-

ations, and citations omitted); *United States* v. *Kenyon*, 481 F.3d 1054, 1063 (8th Cir. 2007) ("We review evidentiary rulings regarding the scope of a cross examination for abuse of discretion, but where the Confrontation Clause is implicated, we consider the matter *de novo*.") (citation omitted).

Though these circuits articulate their rules in different ways,[1] the rules appear to be functionally similar. The Ninth Circuit recently considered the law in all of these circuits, as well as this Court's precedents, in an en banc decision addressing the proper standard of review for Confrontation Clause cross-examination claims. See *United States* v. *Larson*, 495 F.3d 1094, 1101-1102 & n.6 (2007), cert. denied, 552 U.S. 1260 (2008). Relying on *Van Arsdall*, the Ninth Circuit concluded that de novo review applies "[i]f the defendant raises a Confrontation Clause challenge based on the exclusion of an area of inquiry," but that abuse-of-discretion review applies "[i]n reviewing a limitation on the scope of questioning within a given area." *Id.* at 1101. The Ninth Circuit went on to observe that this holding brought it "in line with a number of [its] sister circuits," including the First, Fifth, Seventh, and Eighth, *id.* at 1101 n.6, and this Court declined to review the issue, 552 U.S. at 1260.

---

[1] There are some differences, for example, regarding the justification for applying abuse-of-discretion review to certain types of limitations on cross-examination—in particular, whether such deferential review is appropriate because those limitations implicate the Confrontation Clause only marginally, see *Linzy*, 604 F.3d at 323, or because those limitations do not implicate the Confrontation Clause at all, see, *e.g.*, *United States* v. *Davis*, 393 F.3d 540, 548 (5th Cir. 2004). What is important for present purposes, however, is not whether challenges to those limitations are appropriately labeled as "constitutional," but the standard of review that such challenges receive.

As previously explained (*supra* at 11), the military judge here did not exclude an entire "area of inquiry" (SR's lie about her previous misconduct), but instead merely "limit[ed] the scope of questioning within [that] area" (barring questions about the precise nature of that misconduct). *Larson*, 495 F.3d at 1101. Therefore, under the hybrid standard just described, petitioner's claim would be reviewed for abuse of discretion—the same standard of review that the CAAF applied.[2]

c. The Tenth Circuit, for its part, has two separate lines of cases that each set forth different rules. In some of its recent cases, the Tenth Circuit appears to have announced that de novo review applies to all Confrontation Clause cross-examination claims. See *United States* v. *Robinson*, 583 F.3d 1265, 1274 (2009); *United States* v.

---

[2] The petition does not argue that the military judge's ruling *did* exclude an entire "area of inquiry," and such a fact-bound argument about how petitioner's particular claim ought to be characterized would not warrant this Court's review. Indeed, review on that basis would be especially unwarranted in light of precedent indicating that the CAAF itself would review de novo the preclusion of an entire area of examination. The CAAF has stated, in a case cited by the plurality here (Pet. App. 5a), that a "defendant's Sixth Amendment right to confront the witnesses against him is violated where it is found that a trial judge has limited cross-examination in a manner that precludes an entire line of relevant inquiry." *United States* v. *Israel*, 60 M.J. 485, 488 (2005) (citing *United States* v. *Atwell*, 766 F.2d 416, 419 (10th Cir. 1985) (explaining that abuse of discretion review is inappropriate "where the trial court precludes inquiry into an entire *area* of relevant cross-examination")); see *United States* v. *Carruthers*, 64 M.J. 340, 344 (C.A.A.F. 2007) (stating that a "military judge's discretionary authority arises only *after* there has been permitted as a matter of right sufficient cross-examination.") (emphasis added; internal quotation marks omitted). Even if the CAAF had misapplied its own precedent, that would be a matter for the CAAF, not this Court, to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

Montelongo, 420 F.3d 1169, 1173 (2005).In other precedents, however, it has—like the First, Fifth, Seventh, Eighth, and Ninth Circuits—applied a hybrid abuse-of-discretion/de novo standard. See *United States* v. *Rosario Fuentez*, 231 F.3d 700, 704 (10th Cir. 2000) ("The complete denial of access to an area properly subject to cross-examination infringes on the Sixth Amendment right of confrontation, and constitutes reversible error. On the other hand, merely limiting the scope of cross-examination is a matter well within the trial judge's discretion and such an error will not lead to reversal unless an abuse of discretion, clearly prejudicial to the defendant, is shown.") (internal quotation marks and citations omitted); see also, *e.g.*, *United States* v. *Atwell*, 766 F.2d 416, 419-420 (10th Cir. 1985).

The Tenth Circuit's divergent precedents do not give rise to a circuit conflict that would warrant this Court's review. The Tenth Circuit has never explained or tried to reconcile the two lines of cases, and it is therefore unclear what standard it would apply to a claim like petitioner's. It is up to the Tenth Circuit, not this Court, to resolve this conflict, see *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam), just as the Ninth Circuit recently resolved a similar intra-circuit conflict on the very same issue, see *Larson*, 495 F.3d at 1100-1102.

3. Even if the question presented otherwise warranted this Court's review, this case would not be an appropriate vehicle for considering it. In arguing that the standard of review was outcome-determinative here, petitioner (Pet. 15-16) and his amicus (NACDL Amicus

Br. 7-16)[3] ignore that petitioner's conviction was affirmed under *both* abuse-of-discretion *and* de novo standards of review. As previously discussed (see *supra* at 7-8), the majority of the United States Coast Guard Court of Criminal Appeals reviewed the military judge's ruling under a special military-specific statute that requires de novo appellate review of all issues. Pet. App. 25a & n.7; UCMJ Art. 66(c), 10 U.S.C. 866(c). It, like the CAAF, upheld the military judge's evidentiary ruling. Pet. App. 25a.

Accordingly, what petitioner asserts here is not merely the right to de novo review of his claim (which he already has had), but instead the right to de novo review by a second appellate court. That assertion implicates features that are peculiar to the military system, which interposes two appellate tribunals between the trial court and this Court, one of which conducts de novo review and one of which primarily exercises discretionary jurisdic-

---

[3] Amicus National Association of Criminal Defense Lawyers additionally errs in suggesting (NACDL Amicus Br. 8-9, 11-12) that the military judge's evidentiary ruling in this case conflicts with rulings on similar facts in *Olden* v. *Kentucky*, 488 U.S. 227 (1988) (per curiam), and *White* v. *Coplan*, 399 F.3d 18 (1st Cir. 2005). In *Olden*, the trial court barred "*all* evidence" about the extramarital live-in relationship that the victim was allegedly lying to protect, going so far as to prevent the defense even from trying to show that she had lied about her living arrangements during direct examination. 488 U.S. 230 (emphasis added); see *id.* at 232 (recognizing trial court's broad discretion reasonably to limit cross-examination, but concluding that "the limitation here was beyond reason"). Similarly, in *White*, the trial court barred "*all* inquiry" into the victims' alleged prior false allegations of sexual assault. 399 F.3d at 22 (emphasis added). Here, by contrast, the members heard testimony from SR herself that she had previously lied in circumstances where she might have faced punishment for telling the truth; the only thing the members did not hear was the alleged sexual context of that lie. See, *e.g.*, Pet. App. 7a.

tion. See UCMJ Art. 67(a), 10 U.S.C. 867(a) (describing CAAF's jurisdiction). Petitioner therefore is incorrect in asserting (Pet. 16 n.14) that "[t]he military context in which this case arises does not affect its suitability as a vehicle to answer the question presented."

Finally, there are indications that the judges in the CAAF plurality and concurrence would have affirmed petitioner's conviction even under a de novo standard. See Pet. App. 6a ("We conclude that further cross-examination of [SR] was not 'constitutionally required.'") (plurality opinion); *id.* at 7a ("The military judge * * * provided [petitioner] what he was due under the Confrontation Clause: an opportunity to impeach the complainant's credibility.") (plurality opinion); *id.* at 9a ("The problem for [petitioner] is that his theory of admission is too far-fetched to pass constitutional * * * muster.") (opinion concurring in the result). No further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
LANNY A. BREUER
Assistant Attorney General
SCOTT A.C. MEISLER
Attorney

OCTOBER 2010